

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCIS X. DOUGHERTY,

Plaintiff,

v.

Civil Action

No. 2:12-cv-01001

THE SCHOOL DISTRICT OF

PHILADELPHIA, et al.,

Defendants.

PRE-TRIAL MEMORANDUM OF THE SCHOOL DISTRICT OF PHILADELPHIA,
LEROY NUNERY AND ESTELLE MATHEWS

A. FACTUAL BACKGROUND

This is a single-plaintiff case involving allegations of First Amendment and whistleblower retaliation. On March 30, 2011, the School District of Philadelphia (the "District"), through former Superintendent Arlene Ackerman, recommended that the School Reform Commission (the "SRC") terminate the employment of the plaintiff, Francis Dougherty ("Plaintiff") based upon his inexplicable apparent disclosure to unknown third parties of confidential and attorney-client privileged information, as well as his refusal to participate in an independent investigation or to discuss the findings of that investigation with his employer. On April 27, 2011, the SRC terminated his employment. Plaintiff was advised of his right to appeal the termination of his employment, but chose not to make such an appeal.

The evidence obtained during the course of discovery demonstrates that, following publication of a November 28, 2010 article by the *Philadelphia Inquirer* alleging impropriety in the award of a District contract, the District's in-house legal counsel initiated an investigation into the alleged improprieties. Due to the variety and

complexity of the potential issues involved, the District's in-house legal counsel subsequently retained one of Philadelphia's most preeminent white-collar attorneys, Michael Schwartz of Pepper Hamilton LLP, to conduct an independent investigation into the alleged improprieties, and to determine whether anyone at the District had violated District policies, or state or federal law.

As part of his investigation, Mr. Schwartz used a forensic software company to obtain electronic data from the District and identified approximately 30 individuals, including Plaintiff, that Mr. Schwartz would need to interview regarding the alleged impropriety. Upon review of that electronic data, Mr. Schwartz recognized that Plaintiff was sending confidential and attorney-client privileged information outside of the District, both to himself and to an unidentified third-party individual by the name of Matthew DuPont. Mr. Schwartz then requested to interview Plaintiff regarding the alleged impropriety and the apparent sharing of confidential information. Plaintiff refused to participate in an interview. In light of Plaintiff's failure to cooperate, or to offer any explanation for the apparent sharing of confidential information, Mr. Schwartz was left only with the conclusion that Plaintiff's conduct violated the confidentiality provisions of the District's Code of Ethics. Accordingly, Mr. Schwartz recommended that Plaintiff be subject to disciplinary actions.

The District next requested a conference with Plaintiff in order to discuss the findings of Mr. Schwartz's investigation, as well as Plaintiff's apparent disclosure of confidential information. Plaintiff again refused to participate. Unable to draw any conclusion other than the conclusion presented by Mr. Schwartz, the District, through Dr. Ackerman, recommended that the SRC terminate Plaintiff's employment. Although

Former Deputy Superintendent Leroy Nunery and former Chief Talent and Development Officer Estelle Matthews agreed with Dr. Ackerman's recommendation, they did not themselves make the decision to recommend termination to the SRC.

Meanwhile, despite his refusal to discuss the contract or the alleged impropriety with the independent investigator, with his employer or even in a public SRC forum, Plaintiff claims to have engaged in protected speech and whistleblowing activities. Specifically, Plaintiff claims to have gone to the media, the Federal Bureau of Investigation ("the FBI"), various state legislators and the Office of Inspector General for the U.S. Department of Education to report the very same information that he repeatedly refused to discuss with the independent investigator or with his employer. However, Plaintiff did not make any such reports at the time of alleged wrongdoing, which, incidentally, he never protested and which his team helped implement. Rather, he only reported the alleged wrongdoing after he became "very, very upset" when he perceived that his professionalism was insulted by Dr. Nunery. On November 10, 2010, the same day that he confronted Dr. Nunery about the perceived insult, Plaintiff began his crusade against the District by, for the very first time, reporting alleged improprieties to various entities.

However, the evidence demonstrates that Dr. Ackerman, Dr. Nunery, and Ms. Matthews were unaware of Plaintiff's reports, let alone the contents of Plaintiff's reports. Plaintiff himself admitted that he only told his closest friend and his closest direct report, and that he had no reason to believe that they shared that information with anyone else, or that anyone else knew about such reports. Additionally, none of the authorities to which Plaintiff made his reports ever made any findings of wrongdoing or waste.

B. FACT WITNESSES (LIABILITY)

1. Francis Dougherty;
2. Estelle Matthews;
3. Leroy Nunery;
4. Yusuf Ali;
5. Darryl Boozer;
6. John Byars;
7. Jeffrey Cardwell ;
8. Dawn Chism;
9. Michael Davis;
10. John Downs;
11. Melanie Harris;
12. Patrick Henwood;
13. Troy Izzard;
14. Lisa Mathewson;
15. Amy McCole;
16. Latifah Phillips;
17. Maqueda Randall-Weeks;
18. Whitney Redding;
19. Sara Richman;
20. Michael A. Schwartz;¹
21. Christina Ward;

¹ Mr. Schwartz is expected to provide testimony as both a fact witness and as an expert witness in the areas of internal corporate investigations, corporate compliance programs, and First Amendment matters.

22. Robert Westall;
23. Custodian of records for the School District of Philadelphia; and
24. Individuals identified in Plaintiff's Pre-Trial Memorandum.

C. FACT WITNESSES (DAMAGES)

1. Francis Dougherty;
2. Susan Gilbert;
3. Andrew Verzilli; and
4. Individuals identified in Plaintiff's Pre-Trial Memorandum.

D. EXHIBITS

1. Pepper Hamilton Summary Report (DOUGHERTY 1-12);
2. Pepper Hamilton Master Chronology and attachments (DOUGHERTY 782-1105);
3. SDP Employee Code of Ethics (DOUGHERTY 101-112);
4. SDP Acceptable Use of Internet, Computers and Network Resources Policy (DOUGHERTY 113-124);
5. Correspondence from Estelle Matthews to Francis Dougherty dated March 30, 2011 (DOUGHERTY 158-160);
6. SRC Resolution A-6 dated April 27, 2011 (DOUGHERTY 161-162);
7. Correspondence from Leroy Nunery summarizing Project Safe Schools;
8. Email from Francis Dougherty to Leroy Nunery re: "Surveillance Camera upgrade plan" dated September 10, 2010 (P-269);
9. Email from Robert Westall to Francis Dougherty dated September 21, 2010 (P-306-308);

10. Email chain between Francis Dougherty and Leroy Nunery dated November 10, 2010 (DOUGHERTY 353-354);
11. "Fact vs Fiction – IBS Philadelphia Inquirer Allegations Unwrapped" (P-547-548);
12. Statement by Leroy Nunery dated November 29, 2010 (P-543-544);
13. Statement by Michael Davis dated March 4, 2011 (P-785-786);
14. Minority/Women Business Enterprise (MWBE) Participation FY 2010 First Half Report (P-204-218);
15. Correspondence and draft correspondence from Francis Dougherty to Leroy Nunery dated November 29, 2010 (DOUGHERTY 2266-2268);
16. Email chain from Lisa Mathewson to Michael Schwartz dated January 6 and January 13, 2011 (Schwartz-6);
17. Email and attachments from Francis Dougherty to "citythoroghbred@yahoo.com" attaching "SECURITY PLAN.doc" dated September 9, 2010 (DOUGHERTY 1771-1773);
18. Emails and attachments from Francis Dougherty to "fxddougherty@yahoo.com" and "fxdd@aol.com" attaching attorney-client privileged email chain re: IBS dated November 15 through 17 and December 6, 2010 (DOUGHERTY 176-193, 197-203, 221-227);
19. Emails and attachments from Francis Dougherty to "fxddougherty@yahoo.com" and "fxdd@aol.com" attaching attorney-client privileged email chain re: GSA dated December 6, 2010 (DOUGHERTY 212-217);

20. Emails and attachments from Francis Dougherty to “fxddougherty@yahoo.com” and “fxdd@aol.com” attaching multiple SDP emails dated November 10, 2010 (DOUGHERTY 325, 1627-1638);
21. Emails and attachments from Francis Dougherty to “fxddougherty@yahoo.com” and “fxdd@aol.com” attaching multiple documents, including Employment Agreement of Dr. Arlene Ackerman, dated November 29, 2010 (DOUGHERTY 546-558);
22. Emails and attachments from Francis Dougherty to “fxddougherty@yahoo.com” and “fxdd@aol.com” attaching multiple documents, including Pay Rate History Report, dated November 29, 2010 (DOUGHERTY 546-558);
23. Pay Rate History Report dated July 2, 2010 (DOUGHERTY 2148-2173);
24. Email chains between Francis Dougherty and Michael McGeehan dated December 15 and December 19-22, 2010 (P-1275-1284);
25. Email chain between Francis Dougherty and Michael McGeehan dated January 8, February 24 and March 25, 2011 (P-1285-1287);
26. Email chain between Francis Dougherty and Nancy Hartey dated December 1-2 and December 21, 2010 (P-1288-1291);
27. Correspondence from Michael McGeehan to Thomas Gluck dated December 1, 2010 (DOUGHERTY 2195-2196);
28. Correspondence from Michael Davis to Thomas Gluck dated December 17, 2010 (P-616-618);

29. Emails from Francis Dougherty to Paul Clymer dated December 22, 2010 and February 17, 2011 (P-1272-1275);
30. FBI Tips and Public Leads webpage (P-463-465);
31. Email chains between Francis Dougherty and Brian Nichilo dated December 22, 2010 and January 18, 2011 (P-634-635, 1272);
32. Email from Francis Dougherty to “oig.hotline@ed.gov” dated December 21, 2010 (P-627);
33. Email chain between Francis Dougherty and Aliki Bonorou attaching “SRC walk or request for camera.doc” dated September 17, 2010 (DOUGHERTY 2246-2249);
34. Email from Francis Dougherty to Aliki Bonorou attaching website link dated August 18, 2010 (DOUGHERTY 2245);
35. Emails between Francis Dougherty and Aliki Bonorou re: Ackerman and SDP (DOUGHERTY 2250-2256);
36. Centennial School District employment application cover letter dated June 24, 2010 (DOUGHERTY 2250)
37. Email chains between Francis Dougherty and Aliki Bonorou re: Abington Township employment application cover letter dated June 23-24, 2010 (DOUGHERTY 2251-2256)
38. Email chains between Francis Dougherty and Aliki Bonorou dated August 31, October 19, November 19, December 8, December 13, and December 21, 2010 and January 5, 2011(P-1301-1315);

39. Email from Jim Doosey to Francis Dougherty dated December 15, 2010 (P-1294-1300);
40. Email chains between Francis Dougherty, Martha Woodall, William Marimow and Phil Goldsmith dated November 12, November 15-17, November 20, November 22, November 24, November 29, December 3, December 6, December 8-10, and December 12-21, 2010 (P-1406-1464);
41. Email chains between Francis Dougherty, Martha Woodall, William Marimow and Phil Goldsmith dated January 11, January 13, March 4, and March 30, 2011 (P-1465-1476);
42. Correspondence from Francis Dougherty to Colini Baenziner & Associates re: County Manager position dated July 14, 2009;
43. Correspondence from Francis Dougherty to Robert E. Slavin re: County Executive Officer position dated September 5, 2009;
44. Correspondence from Francis Dougherty to John Anzivino re County Manager position dated September 14, 2009;
45. Correspondence from Francis Dougherty to James Cawley, Paul Clymer, Gene DiGirolamo, Diane Ellis-Marseglia and Charles Martin re: Chief Operating Office position dated October 23, 2009;
46. Correspondence from Francis Dougherty to Abington Township dated June 24, 2010 (DOUGHERTY 2240);
47. Centennial School District Business Administrator position information (DOUGHERTY 2239);

48. Centennial School District Business Administrator cover letter (DOUGHERTY 2242-2244);
49. Reference letter from Phil Goldsmith on behalf of Francis Dougherty (DOUGHERTY 2223-2226);
50. American Red Cross Regional Chapter Executive position information (DOUGHERTY 2228-2234)
51. Correspondence from Francis Dougherty to Leslie Pickus Mazza dated November 4, 2010;
52. Drexel University Executive Director position information (DOUGHERTY 2235-2237);
53. Correspondence from Francis Dougherty to Drexel University dated December 8, 2010 (DOUGHERTY 2222);
54. Email chain between Francis Dougherty and Michael McGeehan dated May 15, 2011 (P-1391);
55. Declaration of Lisa Mathewson;
56. Declaration of Estelle Matthews;
57. Articles published by *The Philadelphia Inquirer* and *Philly.com* relating to the School District of Philadelphia dated December 2009 through April 2011;
58. Transcript of unemployment compensation hearing of Francis Dougherty (DOUGHERTY 442-531);
59. Plaintiff's Complaint and Defendants' Answer to Plaintiff's Complaint;

60. Defendants' Interrogatories and Requests for Production of Documents directed to Plaintiff and Plaintiff's responses thereto; and
61. Documents included on Plaintiff's Pre-Trial Memorandum.

E. LENGTH OF TRIAL

Defendants expect that trial will last approximately eight (8) trial days.

F. SETTLEMENT

Plaintiff has not made a recent settlement demand and Defendant has not made a settlement offer.

Respectfully submitted,

TUCKER LAW GROUP, LLC

Dated: August 26, 2013

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**Attorneys for The School District of
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Matthews**

CERTIFICATE OF SERVICE

I, Bacardi L. Jackson, Esquire, do hereby certify that I caused to be served a true and correct copy of the Pre-Trial Memorandum of The School District of Philadelphia, Leroy Nunery and Estelle Matthews to the following via ECF notification:

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Dated: August 26, 2013

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